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Nos. 05-908 and 05-915

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioners,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents,

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND
NEXT FRIEND OF JOSHUA RYAN MCDONALD
Petitioners,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents,

On Writs of Certiorari to the United States Courts of Appeal for the Sixth and Ninth Circuits

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BRIEF OF THE ASIAN AMERICAN LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. USE OF RACE IS "ODIOUS" AND SHOULD BE RESERVED FOR SITUATIONS WHERE IT WILL VINDICATE, NOT TRAMMEL RIGHTS	5
A. A Decision Allowing School Officials To Classify Students By Race Would Encourage Renewed Discrimination Against San Francisco's Chinese American Schoolchildren	5
B. The Experiences Of The Named Plaintiffs And Class In *Ho* Demonstrate That Mandated Diversity Harms Individuals, Even Members Of Groups That Have Historically Suffered Discrimination	7
C. A Settlement Ending Racial Balancing Was Reached In *Ho* Only Because The Law Was Clear That The School District's Goal Of Diversity Could Not Justify Its Use Of Race	10
II. HISTORICALLY, THE STATE'S DISCRETIONARY USE OF RACE HAS *NEVER* BEEN JUSTIFIED BY A COMPELLING GOVERNMENT PURPOSE	11

TABLE OF CONTENTS—Continued

Page

A. The Experience Of Chinese Americans Amply Illustrates That, Whatever The Excuse Of The Times, History Will Find That It Was Wrong To Treat Individuals As Faceless Members Of A "Race" 11

B. Respondents' Classification Of Schoolchildren By Race Is Unlikely To Produce Benefits But Is Certain To Cause Harm 14

C. Particularly Suspect Are Declarations By Experts And Other Luminaries That Social Agendas Or National Necessity Require Classifying Citizens By Race 17

III. THE DISTRICTS' RACIAL BALANCING PLANS MERIT "HOSTILE" REVIEW AND NOT THE "LENIENT" STRICT SCRUTINY APPLIED BY THE COURTS BELOW 20

A. The Court Should Reject Any Suggestion That Respondents' Lofty Goals Entitle Their Racial Balancing Schemes To A More Sympathetic Review 20

B. The Argument That Students Are Not Really Burdened Because Their "Race" Is Already "Overrepresented" And They Are Placed In School Somewhere Is A Modern-Day Perversion Of The "Separate But Equal" Doctrine 22

IV. THE RESULTS IN *GRUTTER* AND *BAKKE* DO NOT SUPPORT RESPONDENTS' USE OF RACE 25

TABLE OF CONTENTS—Continued

Page

A. The Holding In *Grutter* Should Be Limited To Graduate Education, And Should Not Be Applied To K-12 Schools, Where Racial Classifications Can Only Cause Harm 25

B. Even If *Grutter* and *Bakke* Did Apply, Respondent School Districts Impermissibly Use Race As The Sole Determinant Of "Diversity" 27

CONCLUSION 29

TABLE OF AUTHORITIES

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Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 3, 21
Brown v. Board of Education, 347 U.S. 483 (1954) 13, 18, 25
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Gong Lum v. Rice, 275 U.S. 78 (1927) 13
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Page

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Page

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Page

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STATEMENT OF INTEREST

The Asian American Legal Foundation ("AALF"), based in San Francisco, California, was founded to protect and promote the civil rights of Asian Americans.[1] Americans of Asian origin have a particular interest in use of race in K-12 school admissions. They have historically been, and continue to be, denied access to public schools due to overt racial and ethnic prejudice as well as ostensibly well-intentioned "diversity" programs. Despite the advances our society has made with respect to racial equality, discriminatory treatment of Asian Americans finds resurgence in the racial balancing schemes at issue here which, even if inadvertently, are used to exclude Asian Americans from public schools.

Students of Asian American descent living in Seattle, Washington and Jefferson County, Kentucky are subject to Respondent school districts' racial balancing plans. *See Parents Involved In Community Schools v. Seattle School District, No. 1,* 426 F.3d 1162, 1166 (9th Cir. 2005); *McFarland v. Jefferson County Public Schools*, 330 F. Supp.2d 834, 840 note 6 (W.D. Ky. 2004), *aff'd per curiam*, 416 F.3d 513 (6th Cir. 2005).[2]

AALF's constituents have also suffered from similar racial classification in the San Francisco, California public school system. In *Ho v. San Francisco Unified Sch. Dist.,* 147 F.3d 854, 864 (9th Cir. 1998), San Francisco's schoolchildren of Chinese descent sued to end a consent decree that mandated racial and ethnic admissions quotas in the San Francisco public school system. After five years of litigation, and after the court found the defendants had almost no chance of

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[1] Letters of consent by all parties to the filing of this brief have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity, other than Amicus Curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Petitioner Crystal D. Meredith, custodial parent and next friend of Joshua Ryan McDonald, is a named plaintiff in *McFarland v. Jefferson County Public Schools*, 330 F. Supp.2d 834.

prevailing, the San Francisco Unified School District and the San Francisco chapter of the NAACP, rather than face a trial, agreed to modify the consent decree and to cease the use of race. *See Ho v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021 (N.D. Cal. 1999).

AALF members organized and supported the *Ho* litigation from the outset. Many of the same issues are presently before this Court in *Parents Involved in Community Schools v. Seattle School District No. 1, et al.*, No. 05-908, and *Meredith v. Jefferson County Board of Education*, No. 05-915. As in *Ho*, the Seattle and Jefferson County school districts are engaged in racial balancing to prevent "racial isolation." They are similarly denying schoolchildren access to public schools and programs solely because of their race.

Significantly, in the courts below, Petitioners relied on the Ninth Circuit Court of Appeals' rulings in *Ho* to argue that the racial assignment schemes at issue here are illegal. A decision by this Court upholding the use of race in the Seattle and Jefferson County school districts would have implications for schoolchildren in all of the nation's public schools. It would endanger the relief secured in *Ho* and could erase the judicial benchmark against K-12 racial balancing schemes established by the *Ho* litigation.[3]

Amicus curiae AALF submits that the long and tragic history of discrimination against Chinese Americans in this country, the Chinese American experience in the *Ho* case, and present, ongoing discrimination faced by members of this historically oppressed group, provide this Court with compelling reasons why it should not allow the equal protection rights of individuals, especially innocent schoolchildren, to be eroded in the name of diversity or social engineering.

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[3] San Francisco school officials have already announced their belief that a victory for Respondents in the Seattle and Jefferson County cases before this Court would allow them to again use race in admitting students to San Francisco's public schools. *See SCHOOLS, Justices Take Cases On Race-Based Enrollment*, San Francisco Chronicle, at B-1 (June 6, 2006).

Accordingly, AALF and its constituents respectfully ask this Court to hear their arguments in favor of Petitioners.

SUMMARY OF ARGUMENT

The Asian American Legal Foundation and its constituents reject and find offensive the notion that Asian Americans, or anyone else, must be classified by race in order to be protected against "racial isolation." As this Court has long held, government use of race is always suspect and should be upheld only where narrowly tailored to a compelling government interest. That limitation is mandated by the personal nature of the right in question—a right that vests solely in the individual, not in a group. *See Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

Unbounded by any remedial purpose, the Seattle and Jefferson County school districts' racial balancing schemes will continue in perpetuity based solely upon the arbitrary judgment of the school districts' administrators. Such use of race violates the Fourteenth Amendment right of all Americans, including schoolchildren of Asian descent, to the equal protection of the laws.

There is nothing in this Court's jurisprudence to sanction diversity alone as a compelling government interest allowing the use of race in K-12 schools. Unlike the situation allowing the limited use of race as one of many factors in the context of voluntary graduate education, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), here, attendance is not optional; children are forced by law to attend K-12 schools. Moreover, the burden of the racial classification falls heaviest on students from poorer and disadvantaged families, who do not have the option of moving or sending their children to private schools.

Furthermore, even if the Court were to accept the notion that racial diversity in K-12 public schools could be a compelling state interest, in violation of the rule articulated in *Grutter*, the Seattle and Jefferson County admissions plans consider only race, and not the many other measures of diver-

sity considered by the University of Michigan Law School. Thus, these plans cannot be narrowly tailored.

Respondents' recitation of a noble purpose should be given no weight. State officials have *always* argued that *their* classification of individuals by race was justified by an important government purpose; yet, our country's history has consistently shown that the express use of race or ethnicity was wrong or misguided. The long history of Chinese Americans in this country, and more specifically, in San Francisco, California, amply illustrates this phenomenon.

Viewed historically as faceless members of a "yellow horde," in years past, individuals of Chinese descent were often the victims of state action directed at "race" that was meant to serve the greater public good. The onus extended to Chinese American children who sought to attend public schools. *See, e.g.*, Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 Asian L.J. 181, 207-208 (May 1998). San Francisco and other cities flatly denied "Chinese" children the right to attend public schools. When courts ordered their admission, the State of California established separate "Chinese" schools, to which Chinese American schoolchildren were restricted by law until well into the twentieth century. *See Ho*, 147 F.3d at 864.

In case after case, the single historical truth that emerges is that the rights of people of Chinese descent—and of all Americans—have been vindicated only by strict application of the Fourteenth Amendment's protection of individual, rather than group, rights. That same rule is no less valid today, and it directly applies to the situations in Seattle and Jefferson County.

In the recent *Ho* case, the San Francisco school district, similar to Respondent school districts, sought to prevent "racial isolation" and promote "educational excellence" through a consent decree that classified children by race for purposes of admission. Members of "overrepresented" races were "capped out" at their chosen schools, with the result that Chinese

American children, who were the largest of the defined groups, faced formidable obstacles in gaining admission to neighborhood schools. *See Ho*, 147 F.3d. at 856-59; David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer*, 16 Harv. BlackLetter J. 39, 54 (Spring 2000).

The main effect of San Francisco's racial balancing scheme was not to improve the educational experience of students, but to make schoolchildren, in particular, Chinese American schoolchildren, feel racially stigmatized and inferior. *See Richmond v. Croson*, 488 U.S. 469, 493 (1989) (use of race promotes feelings of "racial inferiority" and "racial hostility"). The results in Seattle and Jefferson County have been and can be no different.

For these and other reasons set forth herein, the school districts' racial balancing programs should be stopped before they harm more individuals and deprive more schoolchildren of their Constitutionally guaranteed rights.

ARGUMENT

I. USE OF RACE IS "ODIOUS" AND SHOULD BE RESERVED FOR SITUATIONS WHERE IT WILL VINDICATE, NOT TRAMMEL RIGHTS.

A. A Decision Allowing School Officials To Classify Students By Race Would Encourage Renewed Discrimination Against San Francisco's Chinese American Schoolchildren.

This Court has repeatedly warned that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (*quoting Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Use of race "threaten[s] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw* at 643. Accordingly, the Fourteenth Amendment provides that, "No State [actor] shall . . . deny to

any person within its jurisdiction the equal protection of the laws." *See Croson*, 488 U.S. at 493.

The Seattle and Jefferson County school districts' use of race in admissions is dangerously unbounded by any remedial purpose, instead resting on the school officials' notion of proper racial balance. Respondents argue the racial mix they seek will provide benefits that justify the sacrifices of those injured by their use of race. Whatever the benefits of this skin-deep diversity, it comes at too heavy a price. Any decision allowing K-12 school officials to classify students by race at their whim would have a far-reaching and chilling effect on individual rights in schools across the nation.

In particular, in a relevant case that AALF respectfully brings to the Court's attention, such a decision would likely result in San Francisco's schoolchildren of Chinese descent again facing race-based discrimination in the city's public school system.

In *Ho v. San Francisco Unified School District*, which began in 1994, San Francisco's Chinese American schoolchildren were forced to turn to the courts for redress of their Fourteenth Amendment rights, in order to halt the school district's policy of classifying and assigning them to the city's K-12 schools on the basis of their race. *See Ho*, 147 F.3d 854; *Ho*, 59 F. Supp. 2d 1021 (on remand); *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316 (1997) (decision giving rise to appeal in 147 F.3d 854).

In *Ho*, the plaintiff class collaterally challenged a consent-decree-mandated racial balancing scheme imposed in *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34 (N.D. Cal. 1983). Without any finding of a constitutional violation to remedy, the consent decree set up a racial balancing scheme with the stated goal of preventing "racial isolation" in the city's schools. *See Ho*, 965 F. Supp. at 1322; *see also Ho*, 147 F.3d at 859. Similar to the objectives of the Seattle and Jefferson County plans, the San Francisco school district's plan sought "to eliminate racial/ethnic segregation or identifiability in any school, classroom, or

program, and to achieve throughout the system the broadest practicable distribution of students from all the racial/ethnic groups comprising the general student population." *San Francisco NAACP*, 576 F. Supp. at 40. This was supposed to produce "academic excellence." *See id. at 42, 58.*

Under the admissions program, nine ethnic groups were arbitrarily defined, including "Chinese." Members of at least four of the groups were required to be present at each school; and no one group could represent more than 45 percent of the student body at any regular school or 40 percent at any alternative school. *See id.; see also Ho*, 147 F.3d at 856. The promotion of racial diversity, and not the remediation of past racial discrimination, was the only real purpose. As described by the district court, "This plan is designed to provide relief for all San Francisco school children; it does not address the needs of any particular racial or ethnic group." *San Francisco NAACP*, 576 F. Supp. at 49.

By the time of the *Ho* challenge, the school district had enlarged the original nine arbitrary racial categories to thirteen equally arbitrary categories to take into account the growing prominence of additional racial groups in the district. *See Ho*, 147 F.3d at 858. Nevertheless, despite the numerous racial categories, no provision was made for the growing number of children of mixed race or for those children who preferred not to declare their race. *See id.* at 862 ("They were not given the option of refusal.").

B. The Experiences Of The Named Plaintiffs And Class In *Ho* Demonstrate That Mandated Diversity Harms Individuals, Even Members Of Groups That Have Historically Suffered Discrimination.

In *Ho*, as in the instant cases, the school district's racial balancing plan affected students of different races in different ways. However, as previously stated, in San Francisco, the burden fell heaviest on students identified as "Chinese." With a long history in San Francisco, over the years, Chinese

Americans had come to constitute the city's largest identifiable ethnic group. *See* Levine, *supra*, at 55-56. Accordingly, in the San Francisco school district's student assignment process, a child identified as Chinese was most likely to be "capped out"—that is, barred because the child's racial quota was exceeded—at desired schools and forced to attend a non-chosen school, often far from his or her neighborhood. *See id.*

At Lowell High School, an academic "alternative" high school that admitted students from middle and junior high schools based on a numerical index derived from a combination of grades and standardized test results, the school district's mandated diversity was maintained by requiring Chinese applicants to achieve numerically higher index scores compared to applicants of all other racial or ethnic groups, including White, Japanese, and Korean, in order to gain admission. *See id.*; Lawrence Siskind, *Racial Quotas Didn't Work in SF Schools,* op-ed, San Francisco Examiner (July 6, 1994). Also, even where preferences were not required to maintain the district's racial caps, the district nevertheless adopted a policy of granting preferences to applicants classified as "Hispanic" or "African American," *See Ho*, 147 F.3d at 858.

The parents of affected children and other concerned Chinese Americans, including officials of the Chinese American Democratic Club, sought relief from the school district, but the unlawful discrimination continued. *See Levine, supra*, at 56-58. Chinese American parents' frustration mounted as their children were turned away from schools for no other reason than that "there were 'too many Chinese.'" *Id.* at 61.

On July 11, 1994, the *Ho* class action was filed by three Chinese American schoolchildren denied admission to city schools because of their race, suing on behalf of themselves and "all children of Chinese descent of school age who were current residents of San Francisco and who were eligible to attend public schools of the school district." Levine, *supra*, at 62-63.

The named plaintiffs' situations amply illustrate the discrimination meted out to Chinese American schoolchildren by school officials:

- Brian Ho was five years old at the time the suit started. In 1994, he was turned away from his two neighborhood kindergartens because the schools had accepted the maximum allowed percentage of "Chinese" schoolchildren. He was assigned to a school in another neighborhood.
- Patrick Wong, then fourteen years old, applied for admission to Lowell High School in 1994. He was rejected because his index score was below the minimum required for Chinese American applicants. However, his score was high enough that he would have been admitted to Lowell had he been a member of *any other* racial or ethnic group recognized in the consent decree. He was rejected at two other high schools because such schools had also accepted the maximum number of schoolchildren of Chinese descent. When he tried to apply to a fourth high school, a newly established academic high school, his mother was told that all spaces for Chinese Americans were "filled" even though spaces for applicants of other racial or ethnic groups were still available.
- The family of Hillary Chen, then eight years old, moved from north of Golden Gate Park to a neighborhood south of the park in December 1993. Hilary was not allowed to transfer into any of three elementary schools near her new home because all three schools had accepted the maximum number of Chinese American schoolchildren.

Id. at 61.

C. A Settlement Ending Racial Balancing Was Reached In *Ho* Only Because The Law Was Clear That The School District's Goal Of Diversity Could Not Justify Its Use Of Race.

After five years of vigorous litigation, the *Ho* case settled on the first day of trial with the defendants agreeing to (i) cease using race to assign students to the city's schools and (ii) end the mandatory requirement of self-classification by race on student enrollment forms. *See Ho*, 59 F. Supp 2d at 1025 (approving settlement).

Beyond question, settlement in *Ho* would never have been reached if the district court and the Ninth Circuit (on an interlocutory appeal from the district court's denial of plaintiffs' request for dissolution of the consent decree) had not emphasized to defendants that (i) under this Court's decisions in cases such as *Croson* and *Adarand*, the school district's goal of diversity did not justify its use of race in accepting students to K-12 schools, and (ii) at trial the school district would have to prove a past constitutional violation tied to its present use of race—a burden defendants were extremely unlikely to carry. *See Ho*, 147 F.3d at 864-65 ("[T]he temporary expedient of using race is to compensate individual persons themselves injured by the malevolent use of race."); *Ho*, 59 F. Supp. 2d at 1024-25 (noting burdens placed by Ninth Circuit's ruling and district court's prior finding that "defendants had shown little likelihood of prevailing at trial").

Thus, key to the *Ho* plaintiffs' vindication of their constitutional rights was the recognition by the district court, and ultimately the school district, that, under the strict scrutiny required by this Court's precedents, racial balancing could not be used to justify the district's use of race, no matter how well-intentioned the district's goals.

If this Court, in deciding the instant cases, allows Respondents to continue to classify K-12 students by race, there is a very real danger that the San Francisco Unified School District will again try to implement a race-based student assignment program, in spite of the *Ho* settlement and in spite

of a new state law prohibiting use of race. Indeed, San Francisco school officials have already announced they will "move ahead with plans to reintroduce race as a factor in enrollments." *See* Bob Egelko, Heather Knight, *SCHOOLS, Justices Take Cases On Race-Based Enrollment,* San Francisco Chronicle, at B-1 (June 6, 2006). "'If the Supreme Court upholds the Seattle system . . . Prop. 209 is a moot point. . . Federal laws would override a state initiative.'" (quoting board member Mark Sanchez). *Id.*

If the Seattle and Jefferson County racial balancing schemes are upheld, it is likely that other school districts around the country will similarly subject millions of other schoolchildren to race-balancing programs. While racial balancing plans would victimize schoolchildren of all races, their impact on the members of ethnic groups historically victimized by state-mandated discrimination would be a dark stain on American jurisprudence. If Respondents' policies are upheld, amicus curiae AALF respectfully submits that the doctrine of "different but equal" at the heart of Respondents' arguments will not be viewed by future generations any more favorably than is today the notion of "separate but equal" finally rejected by this Court in *Brown v. Board of Education.*

II. HISTORICALLY, THE STATE'S DISCRETIONARY USE OF RACE HAS *NEVER* BEEN JUSTIFIED BY A COMPELLING GOVERNMENT PURPOSE.

A. The Experience Of Chinese Americans Amply Illustrates That, Whatever The Excuse Of The Times, History Will Find That It Was Wrong To Treat Individuals As Faceless Members Of A "Race"

The experience of Chinese Americans in this country illustrates that, whatever the justification given by state officials at the time, history will in the end find that group identity should never be elevated above individual rights. The struggle by Chinese American schoolchildren in *Ho* against

race-based treatment was particularly ironic in that, for much of the preceding century and a half, Americans of Chinese descent had struggled against racial discrimination, particularly in San Francisco.

Throughout their history in this country, individuals of Chinese descent have sought to participate in and contribute to American society but have often faced significant barriers solely because of their race. *See, e.g.*, Charles McClain, *In Search of Equality* (Univ. of Cal. Press 1994); Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (Univ. of Ill. Press 1991); Victor Low, *The Unimpressible Race* (East/West Publishing Co. 1982). Their treatment gave rise to the expression "a Chinaman's Chance," a term meaning "having little or no chance of succeeding." News Watch Diversity Style Guide, *at* http://www.ciij.org/publications_media/20050321-133409.pdf.

Time and again, Chinese Americans received equal treatment only after appealing to the federal judiciary for the protections guaranteed individuals by the United States Constitution.

For example, in *Ho Ah Kow v. Nunan*, 12 F. Cal. 252 (C.C.D. Cal. 1879) (No. 6,546), a district court invalidated San Francisco's infamous "Queue Ordinance" on equal protection grounds. In *In re Ah Chong*, 2 F. 733 (C.C.D. Cal. 1880), the court found unconstitutional an act forbidding Chinese Americans from fishing in California waters. In *In re Tiburcio Parrott*, 1 F. 481 (C.C.D. Cal. 1880), the court declared unconstitutional a provision of California's 1879 constitution that forbade corporations and municipalities from hiring Chinese.

In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), this Court ruled that Chinese were "persons" under the Fourteenth Amendment and could not be singled out for unequal burden under a San Francisco laundry licensing ordinance. In *In re Lee Sing*, 43 F. 359 (C.C.D. Cal. 1890), the court found unconstitutional the "Bingham Ordinance," which mandated residential segregation of Chinese Americans. In *United*

States v. Wong Kim Ark, 169 U.S. 649 (1898), this Court ruled that a Chinese American boy, born in San Francisco, could not be prevented by San Francisco officials from returning to the city after a trip abroad.

Chinese American schoolchildren were long denied access to the public schools. In *Tape v. Hurley*, 66 Cal. 473, 6 P. 12 (1885), the court had to order San Francisco public schools to admit a Chinese American girl who was denied entry because, as stated by the State Superintendent of Public Instruction, public schools were not open to "Mongolian" children. *See* McClain, *supra*, at 137. In response, the California legislature authorized separate "Chinese" schools to which Chinese American schoolchildren were restricted by law until well into the twentieth century. *See Ho*, 147 F.3d at 864; *see also* Kuo, *supra*, at 207-208 (noting that "Chinese" were segregated even when "Japanese" were not).

Even though it is not widely known, Chinese American schoolchildren were some of the earliest victims of "separate but equal" jurisprudence as it related to education. In *Wong Him v. Callahan*, 119 F. 381 (C.C.N.D. Cal. 1902), the district court denied a child of Chinese descent the right to attend his neighborhood school in San Francisco, reasoning that the "Chinese" school in Chinatown was "separate but equal." 119 F. at 382. In *Gong Lum v. Rice*, 275 U.S. 78 (1927), this Court affirmed that the separate-but-equal doctrine articulated in *Plessy v. Ferguson*, 163 U.S. 537 (1896), applied to schools, finding that a nine-year-old Chinese American girl residing in Mississippi could be denied entry to a "white" school because she was a member of the "yellow" race. *Id.* at 87.

Thus, in *Lee v. Johnson*, 404 U.S. 1215 (1971), Justice Douglas wrote that California's "establishment of separate schools for children of Chinese ancestry . . . was the classic case of *de jure* segregation involved [and struck down] in *Brown v. Board of Education*, 347 U.S. 483 [1954]. . . ." *Id.* at 1216. "*Brown v. Board of Education* was not written for blacks alone. It rests on the Equal Protection Clause of the

Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco. *See Yick Wo v. Hopkins*, 118 U.S. 356." *Lee,* 404 U.S. at 1216.

In all the historical instances in which the state used race to classify Chinese Americans, the state officials articulated reasons—exactly as they do here—why such use of race was necessary or advanced legitimate societal goals. In every instance, the racial classification scheme was later acknowledged to have been wrong and an impermissible infringement of individual rights.

B. Respondents' Classification Of Schoolchildren By Race Is Unlikely To Produce Benefits But Is Certain To Cause Harm.

The school districts' classification of children by race teaches them precisely the wrong lessons, and can only cause harm. As this Court has explained, "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of his or her own merit and essential qualities." *Rice v. Cayetano,* 528 U.S. 495, 517 (2000).

In *Ho,* as here, the school officials claimed that classifying students by race saved them from "racial isolation," and would bring them educational benefits. "The decree's two goals were to 'eliminate racial or ethnic segregation . . .' and to 'achieve academic excellence' throughout the school district, by which it meant raising the academic performance of black and Hispanic students." Michael W. Lynch, *San Francisco's Chinese Wall,* Policy Review (May/June 1997).

After the filing of the *Ho* case, however, even proponents of San Francisco's racial balancing scheme were forced to admit that no discernable benefits had been produced. One of the more telling indictments was issued by a Grand Jury convened to investigate the success of the program. *See* Grand Jury Report, *The San Francisco Unified School District, at* http://www.sfgov.org/site/courts_page.asp?id=3953 (San Francisco Civil Grand Jury Report, 1996-97). After extensive investigation, including analysis of collected data

and reports by Professor Gary Orfield, a court-appointed education expert, the Grand Jury concluded that racial balancing had achieved nothing but racial balancing:

"Fourteen years of experience with the Consent Decree have established that while it has met its goal of *de facto* desegregation, it has been a failure at accomplishing its primary purpose of achieving academic excellence for all ethnic groups." *Id.* at VI (Conclusion). The Grand Jury in particular found that racial balancing had not worked for Hispanic and African American students, whose academic scores were "lower than those of comparable students around the country . . . . The Grand Jury concludes that the Consent Decree is not working, at least for the substantial African-American and Hispanic groups." *Id.* at IV.

The Grand Jury found that what was needed was, not more racial diversity, but rather more family involvement: "The support, encouragement, example (and occasional prodding) of parents lies behind every successful student. . . . Parental involvement in education should become a prime goal of the District." *Id.* at VI (Findings). The Grand Jury's findings are consistent with the long-standing consensus of experts on the subject: "The legendary Coleman Report of the 1960s found that *after the influence of the family,* the socioeconomic status of a school is the single most important determinant of a student's academic success." *See* Richard D. Kahlenberg, *One Pasadena: Tapping the Community's Resources to Strengthen the Public Schools,* Report to the Pasadena Educational Foundation, p. 20 (May 24, 2006), *at* www.pusd.us/filemgmt_data/files/Kahlenberg %20ReportPDF.pdf (emphasis added).[4]

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[4] Ironically, it was San Francisco's enforced busing of students that had destroyed the neighborhood character of schools and discouraged parental involvement. In just one example, at the hearing approving the consent decree's racial balancing plan, the court rejected the appeals of black parents from the Bayview/Hunter's Point neighborhoods that the plan would destroy neighborhood schools where they took "pride in the academic achievements" of their children. *See San Francisco NAACP,* 576 F.Supp. at 49. The court acknowledged "that the children at Drew School

While mandated racial balancing in San Francisco's schools did not produce discernable benefits, it caused obvious harm. As this Court warned in *Croson*, San Francisco schoolchildren were stigmatized by the school district's use of race. *See Croson*, 488 U.S. at 493. Evidence of the stigmatization was found even in the Grand Jury's report: "We have the anecdotal evidence of one principal, that although her school is desegregated, she cannot get Asian and black children to hold hands in a simple playground game of 'Ring Around the Rosie.' . . . In short, the Decree has resulted in physical desegregation. Social desegregation remains a distant goal." Grand Jury Report, *supra*, at IV.

After the *Ho* case was filed, newspapers widely reported the stigmatization felt by children targeted by the racial quotas. As stated by the parent of one "Chinese" youth turned away because of his ethnicity, "He was depressed and angry that he was rejected because of his race. Can you imagine, as a parent, seeing your son's hopes denied in this way at the age of 14?" Julian Guthrie, *S.F. School Race-Bias Case Trial Starts Soon*, San Francisco Examiner, at C-2 (Feb. 14, 1999).

As Lee Cheng, Secretary of AALF, testified in a written statement for hearings held by the U.S. House of Representatives, Sub-Committee on the Constitution:

> Many Chinese American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends. Often they become ashamed of their ethnic heritage after concluding that their unfair denial is a form of punishment for doing something wrong.

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and Pelton School to some extent are being asked to make sacrifices," but explained that pedagogical experts had concluded the "desegregation" benefits would ultimately make their sacrifices worthwhile. *Id.* The result was that, fourteen years later, only one of San Francisco's schools, the magnet Lowell high school, still had an affiliated parental organization. *See* Grand Jury Report, *supra*, fn. 12.

Lee Cheng, *Group Preferences and the Law*, U.S. House of Representatives Sub-Committee on the Constitution Hearings (June 1, 1995), *at* http://judiciary.house.gov/legacy/274.htm.

Another insidious byproduct of the school district's racial balancing plan was "rampant dishonesty," as parents of all races attempted to misreport children's racial identity to gain admission to desired schools. *See* Michael Dorgan, *Desegregation or Racial Bias?*, San Jose Mercury, at 1A (June 5, 1995). "[S]ome black families in Bayview-Hunter's Point have gone so far as to take Hispanic surnames to protect their children from busing." *Id.* at 10A. "People know if they want to go to a particular school that has a lot of Caucasians, they should put down something other than Caucasian, and they do." *Id.* at 10A (quoting School Board President Dan Kelly).[5]

Thus, in San Francisco, mandated diversity in K-12 schools produced no educational benefits. Instead, it taught schoolchildren that they were categorized and limited by their race. There is no reason to suppose that in Seattle and Jefferson County the result could be any less damaging.

C. Particularly Suspect Are Declarations By Experts And Other Luminaries That Social Agendas Or National Necessity Require Classifying Citizens By Race.

The Court should be wary of Respondents' attempt to do an end run around their need for a compelling state interest to justify their use of race by proffering statements by government officials, experts and other luminaries that classification by race is necessary to advance societal and other goals. Where such self-serving statements have in the past been accepted by courts, they have consistently failed to pass the test of time.

In *Plessy v. Ferguson,* 163 U.S. 537, the Court accepted the view of society that, even though all persons were equal before the law, the public good allowed the use of "distinc-

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[5] On the school enrollment forms, parents were threatened with "perjury" if they misreported the race of their child. *See Ho,* 147 F.3d at 862.

tions based upon color." The lone dissenter, Justice John Harlan, wrote: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case . . ." *Id.* at 558. History proved Justice Harlan to be right.

In *Brown v. Board of Education,* 347 U.S. 483, this Court properly rejected arguments by state officials from Kansas, Delaware, Virginia and South Carolina that black and white children learned better in a single-race environment, and for societal purposes could be kept separate by state mandate. Expressly rejecting any contrary findings regarding "psychological knowledge" made in *Plessy v. Ferguson,* the Court found that use of race produces a "sense of inferiority." "We conclude that, in the field of public education, the doctrine of 'separate but equal' has no place." *Brown,* at 494-495.

Today, it is universally acknowledged that the Roosevelt administration and military authorities infringed the constitutional rights of Japanese Americans when, during World War II, the government placed them under curfew, then removed them from their West Coast homes and placed them in internment camps.[6] Yet, at the time, when the affected citizens pled with the courts to uphold their constitutional rights, the courts passively accepted statements by administration and military officials that such use of race was necessary in the national interest.

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[6] Executive Order No. 9066 was issued on February 19, 1942. It authorized the Secretary of War and certain military commanders "to prescribe military areas from which any persons may be excluded as protection against espionage and sabotage." Congress enacted § 97a of Title 18 of the United States Code, making it a crime for anyone to remain in restricted zones in violation of such orders. Military commanders then, under color of Executive Order No. 9066, issued proclamations excluding Japanese Americans from West Coast areas, and sending them to internment camps. *See Korematsu v. United States*, 584 F. Supp. 1406, 1409 (N.D. Cal. 1984)

In *Hirabayashi v. United States*, 320 U.S. 81, this Court affirmed the conviction of an American citizen found guilty of violating the curfews imposed on Japanese Americans. In *Korematsu v. United States*, 323 U.S. 214 (1944), this Court upheld the conviction of an American citizen of Japanese descent, who had violated an exclusion order by remaining in his San Leandro, California home, rather than go to an internment camp. The courts at all levels deferred to declarations by military authorities that such discrimination by race was necessary to advance compelling government interests. *Id.* 217-219.[7] Amicus briefs submitted by the states of Oregon, Washington and California, urged and supported the decisions. *See Korematsu v. United States*, 584 F. Supp 1406, 1423 (N.D. Cal. 1984).

Much later, of course, it was discovered that government and military figures had misled the courts; and that the government had known that there was no national necessity requiring the use of race. *See Korematsu*, 584 F. Supp. at 1420; *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). The 1980 Commission on Wartime Relocation and Internment of Civilians found that the curfew and exclusion orders had been motivated by "racism" and "hysteria" and not "military necessity," and stated:

> [A]t the time of the issuance of Executive Order 9066 and implementing military orders, there was substantial credible evidence from a number of federal civilian and military agencies contradicting the report of General DeWitt that military necessity justified exclusion and internment of all persons of Japanese ancestry . . .

See Korematsu, 584 F. Supp at 1416. "[T]he government deliberately omitted relevant information and provided mis-

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[7] "It was uncontroverted at the time of conviction that [Fred Korematsu] was loyal to the United States and had no dual allegiance to Japan. He had never left the United States. He was registered for the draft and willing to bear arms for the United States." *Korematsu*, 584 F. Supp. at 1409.

leading information in papers before the court. The information was critical to the court's determination. . ." *Id.* at 1420.[8]

Here, also, this Court should be wary of the attempts by Respondents' declarants and *amici curiae*—no matter how illustrious their credentials or purportedly noble their goals—to manufacture a compelling state interest to excuse the use of race. If history teaches any lessons, it is that generally, proffered justifications for the state's use of race will, in the end, be found to be hollow.

III. THE DISTRICTS' RACIAL BALANCING PLANS MERIT "HOSTILE" REVIEW AND NOT THE "LENIENT" STRICT SCRUTINY APPLIED BY THE COURTS BELOW.

A. The Court Should Reject Any Suggestion That Respondents' Lofty Goals Entitle Their Racial Balancing Schemes To A More Sympathetic Review.

The racial balancing schemes at issue here are no less offensive because they dispassionately view children as jelly beans, to be arranged by color at the school officials' whim. The record amply illustrates that, although the courts below claimed to be applying strict scrutiny, in fact they accorded the school districts' racial balancing programs a somewhat deferential review because of the programs' supposed lofty motives and benign effect. One judge of the Ninth Circuit Court of Appeals, in his concurrence, as much as conceded that Respondents' racial balance schemes could not survive

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[8] Referring to the *Hirabayashi* and *Korematsu* cases, Justice Powell later wrote, "Only two of this Court's modern cases have held the use of racial classifications to be constitutional." *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring). Ironically, those two cases were recently joined by a third, *Grutter v. Bollinger*, 539 U.S. 306 (2003), where "[t]he Court also heeded the judgment of amici curiaeincluding educators, business leaders and the military—" that a compelling government interest was present to justify a law school's use of race. *See Parents*, 426 F.3d at Note 13; *Grutter*, 539 U.S. at 330-331.

actual strict scrutiny, and suggested that this Court should apply "rational basis" scrutiny in any review:

> When the Supreme Court does review the Seattle plan, or one like it, I hope the justices will give serious thought to bypassing strict—and almost always deadly—scrutiny, and adopt something more akin to rational basis review. Not only does a plan that promotes the mixing of races deserve support rather than suspicion and hostility from the judiciary, but there is much to be said for returning primacy on matters of educational policy to local officials.

Parents, 426 F.3d at 1195 (Kozinski, J., concurring).

However, this Court has repeatedly held that racial classifications always require a hostile review. The "mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight," *Croson*, 488 U.S. at 500. As this Court has repeatedly emphasized, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the *individual*." *Shelley*, 334 U.S. at 22 (emphasis added). Thus, as this Court declared in *Adarand*, there are no "benign" racial classifications. "[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." 515 U.S. at 227 (emphasis added).

In both *Ho* and the instant cases, state actors essentially argue that diversity programs are benign because they are not motivated by animus and are applied impartially. In *Shelley*, 334 U.S. 1, this Court rejected the notion that equal protection is not violated when individual rights are trammeled as a result of the state's impartial enforcement of schemes with discriminatory impact on individuals. In that case, the Court considered whether states might enforce covenants in residential deeds restricting occupancy to Caucasians. *See* 334 U.S. at 4-7. Rejecting the argument that, because the state

courts were equally willing to uphold restrictive covenants against Caucasians, such action did not violate individuals' rights to equal protection, this Court explained, "The rights established are *personal* rights. . . . Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Id.* at 22 (emphasis added).

Here, as in *Shelley* and *Ho*, school districts cannot trammel the rights of individual members of one group merely because they do so dispassionately and are equally willing to trammel the rights of members of other groups. Because the Constitution protects individuals, and individuals alone, the rights of affected individuals should be placed above all other considerations, including the perceived good of having present in K-12 classrooms some "ideal" racial mix.

Accordingly, programs that classify individuals by race, such as those here, *must* be given a "hostile" review, with no deference to any motives of the state actor or any supposed benign result.

B. The Argument That Students Are Not Really Burdened Because Their "Race" Is Already "Overrepresented" And They Are Placed In School Somewhere Is A Modern-Day Perversion Of The "Separate But Equal" Doctrine.

There is no merit to the suggestion that students in Seattle and Jefferson County are somehow not really burdened because their "race" is "overrepresented" in their chosen school and, in the end, they are assigned to a comparable school somewhere in the district: "All of Seattle's high school students must and will be placed in a Seattle public school. . . . Thus, no stigma results from any particular school assignment." *Parents*, 426 F.3d at 1181.

First, the record shows that the schools at issue are not equal, but "vary widely in desirability." *Parents*, 426 F.3d at 1169. More important, as stated by this Court, it is not the ultimate result of the racial classification that constitutes the harm, but the imposition of the classification itself: "The

'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Northeastern Fla. Ch. of Assoc. Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

Nor can it matter that, in the view of Respondent school districts, the school from which the applicant is excluded already has "too many" of the applicant's race. Underlying the arguments of those who favor racial balancing is the mistaken assumption that it is moral to turn away an individual because that person's "group" is already "overrepresented." This kind of thinking invariably is used to oppress individuals, diminishing them as persons in proportion to the perceived numbers of their "group." It also invariably insures that the burden will fall heaviest on the poorer or weaker members of the disfavored group.[9]

In one cautionary example from higher education, in the 1920s, Harvard College and other prominent universities reacted to the perceived "over-representation" of Jews in their student bodies by setting up informal quotas that persisted through the 1950s. *See* Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws*, 66 Brook. L. Rev. 71, 111-12 (Spring 2000); Alan M. Dershowitz and

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[9] It is well known that "preference beneficiaries are overwhelmingly from middle- and upper-class families." *See* Peter H. Schuck, *Affirmative Action, Don't Mend It or End It - Bend It*, The Brookings Review, Vol.20 No.1, p. 27 (Winter 2002), *at* http://www.brook.edu/press/review/winter 2002/schuck.htm. Similarly, students from wealthier families tend to escape the burdens imposed by racial balancing. That phenomenon was evident in *Ho:* "Whenever such quotas keep white children out of San Francisco's few good high schools, their parents can often afford to send them to private school. But like many Chinese-American parents, Patrick's mother, who was raising him alone, could not afford private tuition." Michael W. Lynch, *San Francisco's Chinese Wall*, Policy Review, p. 1 (May-June 1997), at www.findarticles.com/p/articles/mi_qa3647/ is_199705/ai_n 8771939. Indeed, in the *Ho* case, it was noted that some school board members who strongly supported the racial balancing scheme sent their own children to private schools. *See id.* at 3.

Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 Cardozo L. Rev. 379, 385-399 (1979); Nathan Glazer, *Diversity Dilemma*, The New Republic (June 22, 1998), *at* http://www.tnr.com/archive/0698/062298/glazer062298.html.

These institutions argued that their diversity schemes brought benefits to all and would lessen ethnic tension. "Harvard initiated its diversity discretion program to decrease the number of Jewish students; President Lowell of Harvard called it a 'benign' cap, which would help the University get beyond race." Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability Of Dworkin's Defense Of Affirmative Action*, 31 Harv. C.R.-C.L. L. Rev. 1, 36 (Winter 1996). No matter how lofty the stated purpose, however, these race-based admissions programs injured individuals by singling them out for unequal treatment. "In the 1930s, it was easier for a Jew to enter medical school in Mussolini's Italy than in Roosevelt's America." Siskind, *supra*.

In *Ho*, a similar sentiment was voiced—that Chinese schoolchildren already had "enough" places in the cities' schools, and that individuals who were turned away had no right to complain: "[T]he Chinese are the largest group at most of the best schools in the city. They can't have it all. If anything, I'd say lower the caps, don't raise them—otherwise we're headed back to segregated schools, only all Chinese instead of all white." Selena Dong, *"Too Many Asians": Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 Stan. L. Rev. 1027, 1057 n.36 (May 1995) (citation omitted) (quoting Lulann McGriff, former president of San Francisco NAACP); *see also* Levine, *supra*, at 138 (observing that to some, "the *Ho* case is about how much is 'enough' for one racial or ethnic group").

Unfortunately, the same arguments are again used today to condone turning away Asian American individuals from the nation's universities. *See* Glazer, *supra*; Dong, *supra*, at 1057, nn.4-5; Leo Rennert, *President Embraces Minority*

Programs, Sacramento Bee (Metro Final) at A1 (April 7, 1995) (reporting that former President Clinton commented favorably on race-based admissions, saying that otherwise, "there are universities in California that could fill their entire freshman classes with nothing but Asian Americans"). "Today's 'damned curve raisers' are Asian Americans . . . ." Kang, *supra*, at 47 n.189 (cites and internal quotation marks omitted). Again, mandated "diversity" is seen as the answer. *See* Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 Wm. & Mary L. Rev. 1, 61-64 (Oct. 1994) (university quotas limit Asian American enrollment).

As history shows, artificial attempts to mandate a racially diverse student body invariably lead to oppression. *See* Dershowitz & Hanft, *supra*, at 399 ("Both then and now . . . such unlimited discretion makes it possible to target a specific religious or racial group—then for decrease, and now for increase . . . .").

Here, as in *Ho*, the Seattle and Jefferson County school districts oppress individuals by requiring them to be viewed and treated only as faceless members of the racial groups into which they are classified. As held in *Brown v. Board of Education*, 347 U.S. 483, such classification of schoolchildren by definition causes injury.

IV. THE RESULTS IN *GRUTTER* AND *BAKKE* DO NOT SUPPORT RESPONDENTS' USE OF RACE.

A. The Holding In *Grutter* Should Be Limited To Graduate Education, And Should Not Be Applied To K-12 Schools, Where Racial Classifications Can Only Cause Harm.

Respondents and the courts below mistakenly attempt to shoehorn the Seattle and Jefferson County districts' use of race into the divided holding of this Court in *Grutter v. Bollinger*, 539 U.S. 306, and into the earlier Powell opinion in *Regents of the University of California v. Bakke*, 438 U.S.

265 (1978). Neither of those cases apply, as both considered only whether a compelling interest in diversity could exist at the graduate school level, where there is a recognized special need for strongly diverse viewpoints.

In *Grutter*, this Court granted certiorari to consider "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities." 539 U.S. at 322, 328. As the Court emphasized throughout its opinion, its review and conclusions were limited to the context of the special needs and circumstances of a graduate school. *See id.* at 322, 328, 331-334, 342-344. Similarly, in *Bakke*, Justice Powell made abundantly clear in his analysis that he was considering only whether diversity could be a "constitutionally permissible goal for an institution of higher education" such as the medical school there at issue. 438 U.S. at 312-321.

There is little parallel between the situation of adults voluntarily attending a national law school, such as considered in *Grutter*, and children in public K-12 schools where attendance is mandatory. Students who are admitted to law school are adults. They generally expect to move to wherever in the nation the law school that accepts them is located. Therefore, in *Grutter*, this Court could recognize the value of a robust diversity of opinions, experiences and ideas in law school, finding that "universities, and in particular, law schools, represent the training ground for a large number of our nation's leaders." 539 U.S. at 332.

In the K-12 schools at issue here, quite different factors predominate. As the courts below noted, "Traditionally, Americans consider the education of their children a matter of intense personal and local concern." *McFarland*, 330 F. Supp 2d at 850. "The record shows, and common experience tells us, that students tend to select the schools closest to their homes. . ." *Parents*, 526 F.3d at 1194. That is, of course, because the grade school students at issue here and in *Ho* are children, living at home with their parents, with both a need

for, and a legitimate expectation of, a school in reasonable proximity to their homes and families.

Unlike the adult student considered in *Grutter*, a K-12 student is forced by law to attend school.[10] Unless the student's family is wealthy enough to consider private school, the student has no choice but to attend the assigned public school. Accordingly, a student forced, in the name of "diversity," to commute each day to a non-neighborhood school is not only oppressed by racial classification but has also been placed under a significant and continuing practical burden. And that burden is heaviest for the poor, who have no other option. Furthermore, as set forth above, busing students away from neighborhood schools also discourages parental involvement in the educational process—the single factor recognized as most important to the success of the K-12 student. *See* Kahlenberg, *One Pasadena, supra,* at 20.

Therefore, the Court's holding in *Grutter* should be confined to the facts of that case.

B. Even If *Grutter* and *Bakke* Did Apply, Respondent School Districts Impermissibly Use Race As The Sole Determinant Of "Diversity"

Respondents' admissions programs are unconstitutional even under *Grutter* and *Bakke,* because they use race as the sole measure of diversity, and thus cannot be narrowly tailored. As this Court's precedents teach, race-neutral alternatives must be used, if available. *See Croson,* 488 U.S. at 471. As Justice Powell stated in *Bakke*, "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." 438 U.S. at 306. As this Court explained in *Grutter,* if an admissions plan assures some specified percentage of a

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[10] "Compulsory education laws in every state require children to attend school. For the many children whose families cannot afford to send them to private school, complying with the law necessarily means attending public school." Rebecca Aviel, *Compulsory Education and Substantive Due Process,* Vol. 10:2 Lewis & Clark L. Rev. 201, 204 (Summer 2006).

particular group merely because of its race, that "would amount to outright racial balancing, which is patently unconstitutional." *Grutter*, 539 U.S. at 329-330 (citations omitted).

There are many sound reasons for foregoing the uneasy proxy of race in determining diversity. Even where generalizations can be made for a group—always a dangerous practice—common sense tells us they are never true of all individuals in the group. *See* Stephan Thernstrom and Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. Rev. 1583, 1624-25 (June 1999) (focus on race ignores true measures of diversity). Race-conscious programs foster unfortunate stereotypes, detrimental even to members of those ethnic groups "favored" by the program. *See id.* at 1608. Racial classifications stigmatize. *See Croson*, 488 U.S. at 493. Accordingly, as explained by Justice O'Connor in her later vindicated dissent in *Metro Broadcasting*, "Social scientists may debate how people's thoughts and behavior reflect their background, but the Constitution provides that the government may not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how they act or think." *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting).

In *Grutter*, this Court held that an institution using race must demonstrate operation of an admission program that evaluates an applicant as "an individual," without race as the "defining" feature. *Grutter*, 539 U.S. at 336-38. This Court found the Michigan law school plan constitutional only because, rather than considering race alone in evaluating "diversity," the law school "engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Grutter*, 539 U.S. at 337. Applying that rule in *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court found the college admission plan at issue there unconstitutional because, instead of considering the totality of the diversity the applicant had to offer, it assigned automatic points for race. *Id.* at 270.

The Seattle and Jefferson County districts have failed to show that they review applicants holistically. Instead, they openly use race as the sole criterion of diversity. The Ninth Circuit approved the Seattle district's use of race as the sole determining factor, ruling, contrary to this Court's holdings in *Grutter* and *Gratz*, that "a [school] district need not consider each student in a individualized, holistic manner." *See Parents*, 426 F.3d at 1183. In Jefferson County, the district similarly considers only race: "In a specific case, a student's race, whether Black or White, could determine whether that student receives his or her first, second, third or fourth choice of school." *See McFarland*, 330 F. Supp. 2d at 842.

Both districts completely ignore all other measures of diversity they could have used.[11] Exactly as did the San Francisco school district in *Ho*, the Seattle and Jefferson County districts' blindly seek nothing more than racial "percentages" reflecting their view of diversity.

Thus, because Respondent school districts classify students by race but have failed to implement programs that consider the totality of the person and not just race, the admission programs at issue cannot be narrowly tailored, and are unconstitutional.

CONCLUSION

The Seattle and Jefferson County school districts' use of race is merely the latest chapter in the long history of state attempts to use race in the public school system. Until recently, many states did not allow "Black" and "Yellow"

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[11] For example, the districts could easily have used socio-economic status as a race-neutral measure of diversity. It is a highly relevant factor in K-12 education. *See* Kahlenberg, *One Pasadena*, *supra*, at 5, 20. Indeed, schools around the country utilize economic integration programs to promote diversity and enhance disadvantaged students' performance. *See* Richard D. Kahlenberg, *Economic School Integration: An Update*, The Century Foundation Issue Brief Series (Sept. 16, 2002), *at* http://www.tcf.org/Publications/Education/economicschoolintegration.pdf ("The number of students attending public schools with economic integration plans has jumped from roughly 20,000 in 1999 to more than 400,000 today.")

schoolchildren to attend "White" schools. In the 19th century, children of Chinese descent were denied access to San Francisco's schools. A hundred years later, in the *Ho* case, Chinese Americans were again singled out for unequal treatment. Now, school officials in Seattle and Jefferson County seek to turn the clock back so that, once again, schoolchildren will be denied access to educational opportunities solely because of their race or ethnicity.

If nothing else, these experiences demonstrate the continuing danger of allowing the state to use race except in the most limited circumstances. There simply can be no compelling interest present in K-12 schools—schools that American children are compelled by law to attend—to justify the use of racial classifications. The desire for a "diverse" student body cannot provide such a compelling interest—and certainly not when, as here, diversity is measured only by race.

Any discretionary use of race by K-12 school officials inevitably results, as in *Ho* and the instant cases, in the stigmatization of children. And, as such use of race is unbounded by any fixed, remedial goal with respect to scope and time, it will, if permitted, continue without end, to the detriment of our society.

Therefore, the Seattle and Jefferson County school districts' race-conscious admissions programs further no compelling government interest, are not narrowly tailored, and should be found to violate Petitioners' Fourteenth Amendment right to the equal protection of the laws.

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